No. 698.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM WOLFF,

Plaintiff in Error,

V.

WELLS, FARGO & COMPANY (A CORPORATION),

Defendant in Error.

Brief for Defendant in Error.

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Filed October 26th, 1901.

Clerk.

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WILLIAM WOLFF,
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v.

WELLS, FARGO AND COMPANY, A CORPORATION,
Defendant in Error.

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Brief for Defendant in Error.

STATEMENT OF THE CASE.

This was an action brought by the defendant in error in the United States Circuit Court, Ninth Circuit and Northern District of California, to recover from the plaintiff in error the sum of $2,876. damages for a breach of contract. The action was tried by the Court without a jury; the parties having signed and filed a written stipulation waiving a jury (Tr., p. 19). Defendant in error

had judgment for the full amount claimed, less the sum of $2,265.60 counterclaimed by the plaintiff in error; that is to say, the defendant in error had judgment for the sum of $610.40. Special findings of fact, covering all the issues in the case, were signed and filed. Briefly stated, the Court found that on or about September 24th, 1897, the plaintiff in error contracted to sell to the defendant in error as much Alsen's German Portland cement, at the rate of $2.56 per barrel, as the defendant in error should require for use in the construction of a building which it was then about to erect; that the plaintiff in error delivered 5,000 barrels of the cement, and no more; that the defendant in error required and was compelled to use 7,925 barrels of cement in the construction of the building, and was obliged to purchase the additional 2,925 barrels, over and above the 5,000 barrels furnished by the plaintiff in error, at an increased price (the price of cement having risen), to its damage in the sum of $2,876. The Court also found that of the 5,000 barrels delivered by the plaintiff in error 885 had not been paid for, and that the plaintiff in error was, therefore, entitled to an offset on its counterclaim in the sum of $2,265.60. Defendant in error accordingly had judgment for the sum of $610.40, and for its costs.

I.

ARGUMENT.

At the outset, we submit, that the only questions which will be considered on this appeal are, first, whether the

special findings support the judgment, and, second, whether or not the trial Court erred in the admission or rejection of any evidence. It is a well settled rule in the federal appellate tribunals, that when a case is **tried by the Court below without a jury pursuant to a stipulation of the parties, the facts found by the trial Court are not open to review, and, if there are special findings of fact, the appellate Court will consider only whether the facts found support the judgment.**

In **Walker v. Miller,** 59 Fed. 869, 870, the Court said:

> "Neither the Supreme Court nor the Court of Appeals will undertake to determine, in a case like the one at bar, whether the special findings are supported by the testimony contained in the bill of exceptions, for to do so would be simply to review the decision of the trial Court on questions of fact, rather than of law. By filing a written stipulation waiving a jury, the parties to the litigation may impose upon the Circuit Court the duty of making a general or special finding on questions of fact, but they cannot impose upon an Appellate Court a like duty; the finding of the trial Court, whether it be general or special, has the same conclusive effect when the case is removed by writ of error to an appellate tribunal as a similar finding by a jury. * * * These several propositions are well established by repeated adjudications."

See also:

Rev. Stat. U. S., §700;
Zeckendorf v. Johnson, 123 U. S. 617, 618;
Stanley v. Supervisors, 121 U. S. 535, 549;
Martinton v. Fairbanks, 112 U. S. 670;
Tyng v. Grinnell, 92 U. S. 467;

Consolidated Coal Co. of St. Louis v. Polar Wave Ice Co., 106 Fed. 798;

Grattan, Tr. v. Chilton, 97 Fed. 145, 150;

Hoge v. Magnes, 85 Fed. 355, 358;

Smiley v. Barker, 83 Fed. 684, 688;

Hardman v. Montana Un. Ry. Co., 83 Fed. 88;

Jones v. McCormick Harvesting Mach. Co., 82 Fed. 295, 296;

Randle v. Barnard, 81 Fed. 682;

White v. Thacker, 78 Fed. 862;

O'Hara v. Mobile & O. R. Co., 76 Fed. 718;

Blanchard v. Commercial B'k, 75 Fed. 249, 252;

Bowden v. Burnham, 59 Fed. 752;

Farwell v. Sturges, 56 Fed. 782.

Counsel for the plaintiff in error in their brief have recited parts of the evidence; much more, we think, than is necessary for a review of the only questions that can be considered on this appeal, and not nearly enough to fully present the case if the findings of fact were to be reviewed. The evidence, oral and documentary, is contained in pages 28 to 63 of the Transcript, while in the brief of the counsel for plaintiff in error it is stated in three and a half pages.

It is clear, from the brief of the counsel for the plaintiff in error, that it is their object to obtain a review by the Appellate Court of the special finding of the Court below, that the plaintiff in error contracted to sell to the defendant in error as much Alsen's German Portland cement as the defendant in error should require for use in the construction of the building which it was about to erect. **(Findings of Fact I, Tr. p. 64.)** In seeking a re-

view of this finding, counsel for plaintiff in error assume that it is based on the letter of September 24th, 1897, alone; the remaining thirty-five or thirty-six pages of evidence, oral and documentary, are entirely passed over. Four witnesses testified on behalf of the plaintiff in error, and four on behalf of the defendant in error; not a line of their testimony is cited. But, even if the letter of September 24th, 1897, were the only evidence in support of the finding with reference to the contract, that fact would not lessen the effect of the rule that the Appellate Court will not review the evidence.

In **Lehnen v. Dickson,** 148 U. S. 71, the Supreme Court of the United States said, at p. 77:

> "But the burden of the statute is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony. It may be an easy thing in one case for this Court, when the testimony consists simply of deeds, mortgages, or other written instruments, to make a satisfactory finding of the facts, and in another it may be difficult when the testimony is largely in parol, and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the ease in determining the facts, or rigorously enforced in another, because of the difficulty in such determination. **The duty of finding the facts is placed upon the trial Court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts.**"

In **Insurance Co. v. International Trust Co.,** 71 Fed. 88, the Circuit Court of Appeals for the Eighth Circuit said, at p. 90:

> "We think, therefore, that **the conclusive effect**

> of a special finding of fact cannot be made to depend upon the character of the proof upon which it rests. If such a finding is regarded as conclusive, and not subject to review, when it rests on oral testimony, it must be regarded as equally conclusive when it rests on written evidence * * *."

Had the plaintiff in error desired to raise the question of the sufficiency, or insufficiency, of the letter of September 24th, 1897, to constitute a contract for only 5,000 barrels of cement, he should not have waived a jury; he could then have called upon the Court for instructions with reference to this letter, and, upon the refusal of the Court to give the instructions, could have raised the question of law which is presented in his brief with reference to the letter.

See **Dirst v. Morris,** 14 Wall. 484, 491.

Coming now to a consideration of the questions which will be determined upon this appeal, we may preliminarily remark that no question is raised as to the sufficiency of the special findings of fact to support the judgment. It is true that, in the eleventh specification of the errors relied upon in their brief, counsel for the plaintiff in error state that the "Court erred in its conclusion of law that the plaintiff was entitled to judgment against the defendant for the sum of $2,876.00, less the sum of $2,265.60—that is to say, the plaintiff was entitled to judgment against the defendant in the sum of $610.40, and for its costs." **(Brief of Plaintiff in Error,** pp. 8 and 9). But no argument is made, nor are any reasons stated, why the Court erred in this particular; nor, do we think, that this assignment is equivalent to a statement that

the special findings do not support the judgment. Be that as it may, however, we are content to submit, without further argument, the question whether the judgment is supported by the special findings. This brings us to a consideration of the errors claimed to have been committed by the trial court in the admission and rejection of testimony.

II.

The first point in the brief on behalf of plaintiff in error relates to specification of errors 1, 2, and 3. It is claimed that the Court erred in permitting the witness George E. Gray to answer the question: "State what your conversation was with Mr. Baker." Also, that the Court erred in permitting the same witness to answer the following question: "Before offering that, Colonel Gray, I will ask you what, if anything, you told Mr. Baker, preliminarily you contemplated doing with reference to a building, and why you were getting these bids?" Also, that the Court erred in denying the motion of the plaintiff in error, made after the introduction of "Plaintiff's Exhibit No. 1," to strike out, upon certain specified grounds, the conversation between the witness, George E. Gray, and Edmund Baker, prior to the said letter. For sake of convenient reference we will insert the letter of September 24th, 1897, "Exhibit No. 1." It is as follows:

"ALSEN'S PORTLAND CEMENT WAREHOUSE,
Manufacturers of Portland Cement. William Wolff
& Co., California Agent, 329 Market
Street, San Francisco.

San Francisco, California, September 24, 1897.

Colonel Geo. E. Gray,
1st Vice-President Wells, Fargo & Co., City.

Dear Sir: Referring to the conversation the writer had with you this afternoon, we take pleasure in submitting to you our quotation on Alsen's German Portland Cement for use in the new Wells, Fargo building now in course of construction.

We will name you a price for what you may require, on about five thousand barrels (5,000) more or less, of two dollars and fifty-six cents ($2.56) per barrel, delivered at the building site, Second and Mission Sts., in quantities to be designated by you.

We will guarantee the Alsen Cement to be of standard quality and subject to any reasonable tests you may call for.

Very respectfully,

(Signed) WILLIAM WOLFF & CO.,
Per Edmund Baker."

It is first claimed that the Court erred in the last-mentioned particulars, because the conversations admitted "modify and change the plain and unambiguous agreement between the parties." It is then contended and assumed that the letter of September 24, 1897, constituted the contract between the parties to the exclusion of all else. This contention ignores all the other evidence. But it is immaterial at this time, and for the discussion of this point, what constituted the contract. The question is, did the Court err in admitting the evidence of the witness Gray, and did it err in refusing to strike it out? It is contended that the interpretation of written instruments belongs to the Court, and that parol evi-

dence cannot be admitted to alter or modify the plain language of a contract. These are propositions that cannot be and are not disputed. It is said that the letter of September 24th, 1897, is plain and unambiguous; still, it is noteworthy that ten and a half pages of the brief of plaintiff in error are devoted to its explanation (pp. 13 to 23.) It is divided into two parts, "artificially styled the introductory and the stating parts" (p. 20), and is subjected to a minute and careful analysis in order to arrive at its meaning.

We submit that the evidence objected to was properly admitted, and the motion to strike out was properly denied, for two reasons:

a. The evidence of the witness Gray did not alter, or modify, or add to, or contradict the letter of September 24th, 1897. It simply explained the letter, and it was properly admitted under the rule that **parol evidence is admissible to explain a writing by a reference to the circumstances under which it was made, including the situation of the subject of the instrument, of the parties to it, and of the matter to which it related, so that the trial judge can be placed in the position of those whose language he is to interpret.** In illustration of the rule we cite the following cases:

In **Reed v. Insurance Co.**, 95 U. S., 23, there was a policy of insurance on a vessel at and from Honolulu, *via* Baker's Island, to a port of discharge in the United States, which contained a clause, "the risk to be suspended while vessel is at Baker's Island loading." At page 30 the Court said:

"This case, on the merits, depends solely upon the

> construction to be given to the clause in the policy before referred to namely, 'the risk to be suspended while vessel is at Baker's Island loading.' * * * Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the Court, in construing their language, from falling into mistakes and even absurdities."

In **Western Union Tel. Co. et al. v. American Bell Tel. Co.**, 105 Fed., 684, there was a dispute over a contract by which the defendant agreed to pay the plaintiffs twenty per cent of all "rentals or royalties" received from licenses for telephones in the United States. The defendant issued licenses to sundry corporations and received in addition to the annual rentals for telephones thirty-five per cent of the capital stock of these corporations. The plaintiffs claimed that this stock was "rentals or royalties" within the meaning of the contract and that they were entitled to twenty per cent of the stock and the dividends declared thereon. The Court said, at page 686:

> "The controversy turns upon the interpretation of the words 'rentals or royalties' in this provision. The defendant contended before the Master that these words had reference to the standard annual

rentals for telephones, and did not include profits derived from the exchange business. In support of this contention the defendant relied, first, upon the contract; and, second, upon evidence of the previous course of business, the negotiations and correspondence between the parties, and prior drafts of the contract. The Master, against the objection of the plaintiffs, admitted this evidence, **not to vary the terms of the contract, but to explain the sense in which the language was used.** If the contract had been limited to the above provisions in Article 1, with the words 'or rates as paid in accordance with the provisions of this contract' omitted, it might have been argued with much force that the meaning of 'rentals or royalties' is plain and admits of but one interpretation, and that it covers everything in the nature of rental or royalty which was received from any license for telephones by the Bell Company. But, reading the whole of this provision in connection with the provisions which follow, the most that the plaintiffs can fairly claim is that the case presents a contract which is capable of two interpretations. This being true it was clearly proper for the Master to admit evidence of previous negotiations and surrounding facts and circumstances relating to the subject-matter of the contract, in order to reach an interpretation of the language used in accordance with the understanding of the parties at the time the contract was entered into. That such evidence is admissible where a contract is capable of two interpretations and a doubt exists as to the true meaning, is well established" (Citing a large number of cases).

In **Hildebrand v. Fogle**, 20 Ohio, 147, the Court said, at page 157:

"These parties may be fairly presumed to have understood the matter about which they were contracting. But the same thing cannot be said of every court and jury that may be called on to interpret their contract. To enable the Court and jury to be

as wise as the parties, and so to arrive at and give application to the words they have used, and thus carry out their intentions, the law permits them to hear a full description, from evidence, of the subject-matter of the contract, and of the circumstances that surrounded the parties at the time it was made; and to learn what were the motives and inducements that led to the contract, and the object to be attained by it; or, as expressed by the Court in the case of Bellinger v. Kitts, 6 Barb., 273: 'In expounding a written instrument, the attendant and surrounding circumstance are competent evidence for the purpose of placing the Court in the same situation and giving it the same advantages for construing the instrument as are possessed by the parties who executed it.' The same rule is laid down by Mr. Greenleaf in his work on Evidence (Vol. I, Sec. 286) and enforced by a great variety of illustrations. The object or tendency of this evidence is not to contradict or vary the terms of the instrument, but to enable the Court to come to the language employed, with an enlightened understanding of the subject-matter in reference to which it has been used."

Section 1647 of the Civil Code of California is as follows:

"A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

Section 1860 of the Code of Civil Procedure is as follows:

"For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret."

See also:

Runkle v. Burnham, 153 U. S. 216, 224;

U. S. v. Peck, 102 U. S. 64;

Brawley v. U. S., 96 U. S. 168;

Bradley v. The Washington A. & G. S. P. Co., 13 Pet. 89, 99;

Peisch v. Dickson, 1 Mason 9, 11, 12;

Chicago Cheese Co. v. Fogg, 53 Fed. 72, 73;

Chicago & I. R. Co. v. Pyne, 30 Fed. 86, 88;

Citizen's B'k of Emporia v. Brigham, et al., 60 Pac. 754, 755;

Baker v. Clark, 128 Cal. 181, 186;

Balfour v. Fresno Canal & Irr. Co., 109 Cal. 221;

Saunders v. Clark, 29 Cal. 299, 304;

Weaver v. Lapsley, 42 Ala. 601, 611;

Ellis v. Burden, 1 Ala. 458, 465, 466;

Bruce v. Moon, 35 S. E. 415, 418;

Brown v. Markland, 52 Pac. 597, 598, 599;

Donlin v. Daegling, 80 Ill. 608;

Mace v. Jackson, 38 Ind. 162, 166;

Keller v. Webb, 125 Mass. 88;

Stoops v. Smith, 100 Mass. 63, 66;

Axford v. Meeks, 59 N. J Law, 502;

Field v. Munson, 47 N. Y. 221;

City of Atlanta v. Schmeltzer, 83 Ga., 609, 613.

b. The evidence was properly admitted, because the letter itself refers to the conversation. It begins: "Referring to the conversation the writer Mr. Baker had with you this afternoon." When Mr. Baker, for the plaintiff in error, wrote the letter, he had in mind, therefore, his conversation with the witness Gray, and it was his deliberate intention that the witness Gray, when reading the letter, should have in mind and consider the conversation; otherwise he would not have begun his letter with a distinct reference to the conversation. Could the trial

Court have given the letter a proper construction without evidence of the conversation which the parties had in mind? When the Court admitted evidence of the conversation it merely placed itself in the position of the parties to the contract at the time that it was made. **When a writing contains a reference to a conversation as a part of the writing, evidence of the conversation is properly admitted in an action involving the writing.**

This rule was recognized in the recent case of

Selig et al. v. Rehfuss et al., 45 Atl. 919.

In that case the Supreme Court of Pennsylvania went so far as to hold that, because there was in a letter, which constituted a contract, a reference to a conversation, the parties could, by the conversation, prove a warranty not contained in the writing. The letter began as follows:

> "**As per our conversation had with your Mr. Rehfuss to-day**, we confirm our order for ten more pearl button machines, like the samples you made for us, thus making eleven machines in all * * *."

The Court said, at page 920:

> "On the trial, plaintiffs insisted that, by the terms of their contract, there had been an express warranty by the defendants that the machines would not infringe upon the patent, and the defense was that, as the letter of November 16, 1894, made the contract a written one, containing no warranty, parol evidence was not admissible to sustain the claim asserted * * *."
>
> "The letter of November 16, 1894, stating that 'As per conversation had with your Mr. Rehfuss to-day * * *,' the offers of the plaintiffs to prove what this conversation was were to make clear that part of the contract not embodied in the letter, and

were properly allowed by the Court. The offers were not to vary the terms of a contract fully and clearly set forth in a writing, nor to incorporate that which had been omitted by fraud, accident, or mistake, but simply to prove the whole contract, of which the letter was evidence of only a part. The learned trial judge, correctly entertaining this view of the letter, properly said to the jury: 'On the 16th of November, you remember, the order was given in writing, **but the writing referred to a conversation, and it is only for that reason that it is for the jury to interpret the whole affair. The writing itself referring to a conversation, I am bound to let the conversation go before you for your judgment, and, when that goes before you for your judgment, you must take it in connection with the writing, and judge them together.'**"

In **Anderson et al. v. National Surety Co.**, 46 Atl., 306, it was **held** that, when a letter which the defendant claimed constituted the contract, began as follows: "As per our conversation of yesterday," parol evidence of the conversation was properly admitted.

See, also:

Ruggles v. Swanwick, 6 Minn. 365, 371;
Durham v. Gill, 48 Ill. 151, 154, 156.

III.

While the subject of the first point of the brief of counsel for plaintiff in error, according to its heading, is the alleged error of the Court in the admission of certain evidence, still the greater part of this point is devoted to a discussion of the letter of September 24th, 1897, under the heading, "Construction of the Writing." We think

the Court will not close its eyes to the fact that this is merely an attempt to obtain a review of the special finding of the trial Court that the plaintiff in error contracted to sell to the defendant in error all the cement it should require for use in the construction of its building. While we contend that this special finding is conclusive upon the Appellate Court, and that the letter of September 24th, 1897, as evidence in support of this finding, is not open to discussion on this appeal any more than would be any other evidence, still, in view of the fact that the Court may determine to pass upon the legal effect of the letter of September 24, 1897, we desire to show that, even if the finding had been based on the letter alone, it was correct.

First, however, we deem it our duty to point out that in discussing this letter counsel for plaintiff in error have not adhered to the evidence furnished by the letter alone. They say that

> "the meaning, as plain as language can make it, is that the writer offers to fix a price on **an article produced abroad.** * * * **Mr. Gray had instructed Mr. Baker to reduce his proposition to writing.** * * This, Mr. Baker did in the matter set out: **but only after he had returned to the office of Wm. Wolff & Co.,** where, it is fair to assume, must have been kept all the information and necessary data concerning the stores of 'Alsen's German Portland Cement' on hand, the lots to arrive, and the true condition of the present and prospective supplies in Europe. **The record makes it manifest that Mr. Baker dictated the letter at the office of Wm. Wolff & Co.," (Brief,** p. 17);

And again, on pages 20 and 21:

> "And upon the complete delivery of the full num-

> ber of barrels expressed, both parties would occupy an equal position, to enter into new and further engagements respecting the price of an article produced only abroad and arriving at San Francisco irregularly in sailing vessels, and in uncertain quantities."

We must ask the Court, in reviewing this letter, if it intends to do so, to eliminate from its consideration all these statements. These very digressions by counsel into the record at large show that counsel are but transgressing a rule founded upon wisdom and justice when they ask this Court to pass upon the special finding of fact claimed to be based upon the letter of September 24th. If, to construe this letter, the Court is asked to pass upon evidence, other than that furnished by the letter itself, it should review all the evidence in the record. This it will not do. Of course, the argument, on page 21 of counsel's brief, that fifty or one hundred thousand barrels of cement might just as well have been demanded, is of no force. There is not even a suggestion, in the entire record, of bad faith on the part of the defendant in error, or that there were any changes in the plans of its building.

With these preliminary remarks, we pass to a consideration of the letter. Without attempting to cover the ground gone over by counsel in their self-styled "artificial," and, we may add, microscopic, analysis of the writing, we call the attention of the Court to the plain and evident purpose of the letter, as expressed upon its face. The writer says:

> "We take pleasure in submitting to you our quotation on Alsen's German Portland Cement for use

in the new Wells, Fargo Building now in course of construction."

In the first place, here was a quotation on cement for use in the new Wells, Fargo Building—not any part or portion of the buiding, but the entire building. Then follows this language:

> "We will name you a price for what you may require, on about five thousand barrels (5,000), more or less, of two dollars and fifty-six cents ($2.56) per barrel, delivered at the building site, Second and Mission Sts., in quantities to be designated by you."

Were one to entirely eliminate the words in the first paragraph of the letter, "for use in the new Wells, Fargo Building now in course of construction," and those in the second paragraph, "for what you may require," then the construction of this writing given to it by counsel for plaintiff in error would be correct. In their discussion of the writing they entirely ignore the expressions "for use in the new Wells, Fargo Building" and "for what you may require." We contend that here was a clear and distinct undertaking to furnish for use in the new Wells, Fargo Building, then in course of construction, as much cement as should be required. In support of this contention we cite first the leading case upon this subject:

Brawley v. United States, 96 U. S. 168.

That case is very similar to the case at bar. This Court is thoroughly familiar with the Brawley case, having had occasion to consider it in the recent case of Budge v. United Smelting and Refining Co., 101 Fed., 198. The Budge case was decided October 1, 1900, a few weeks

prior to the trial of the case at bar, and the learned Judge of the Court below in the case at bar was one of the Judges who participated in the decision in the Budge case.

In **Brawley v. United States,** Brawley executed a contract by which he agreed to sell "eight hundred and eighty (880) cords of * * * oak wood, more or less, as shall be determined to be necessary, by the post commander, for the regular supply, in accordance with army regulations, of the troops and employees, * * * for the fiscal year ending June 30th, 1872." Forty cords of the wood only were received and accepted by the post commander, and Brawley filed a petition in the Court of Claims to recover for the remaining eight hundred and forty cords. The Court of Claims dismissed the petition and Brawley appealed to the Supreme Court of the United States. In delivering the opinion of the Court, Mr. Justice Bradley said:

> "The contract was not for the delivery of any particular lot or for any particular quantity, but to deliver at the post of Fort Pembina eight hundred and eighty cords of wood, 'more or less, as shall be determined to be necessary by the post commander for the regular supply, in accordance with army regulations, of the troops and employees of the garrison of said post, for the fiscal year beginning July 1st, 1871.' These are the determinative words of the contract, and the quantity designated, 880 cords, is to be regarded merely as an estimate of what the officer making the contract at the time supposed might be required. The substantial engagement was to furnish what should be determined to be necessary by the post commander for the regular supply for the year, in accordance with army regulations."

Mr. Justice Bradley laid down three general rules as applicable to cases of this kind, the third of which is as follows:

> "If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions, as, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variations from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith."

It is clear, we submit, that the contract in the case at bar falls within this third general rule, and that the principles which determined the Brawley case are determinative of the case at bar. "Five thousand barrels" was a mere estimate. The determinative words of the contract were to sell as much cement for use in the new Wells, Fargo Building as should be required.

Applying the language of Mr. Justice Bradley, in the Brawley case, to the case at bar:

> "the contract was not for the delivery of any particular lot, or any particular quantity, but to deliver for use in the new Wells, Fargo Building now in course of construction five thousand barrels, more or less, as you may require.
>
> "These are the determinative words of the contract and the quantity designated, five thousand barrels, is to be regarded merely as an estimate of what the parties making the contract at the time supposed

might be required. The substantial engagement was to furnish such amount of cement as should be required by Wells, Fargo & Company for use in its new building."

We further submit that the decision of this Honorable Court in **Budge v. United Smelting & Refining Co.**, 104 Fed. 498, but emphasizes the correctness of this view of the contract. The contract in the **Budge** case was classed under the second general rule stated by Mr. Justice Bradley in the **Brawley** case, i. e.:

> " When no independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about', 'more or less', and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight."

In the **Budge** case this Court said:

> " The provision that the latter (the lagging or cribbing timber) should be delivered as requested 'at the tunnels mentioned' and 'in the quantities designated' by the defendant, has reference only to the **place and method of the delivery, and not to the total quantity required and used.** The defendant, upon his part, covenanted to pay the plaintiff for all mining timbers, 'about six hundred,' and for all lagging and cribbing received by him, 'about fifteen thousand.' Here is a distinct promise to receive and pay for about six thousand pieces of one kind of timber and fifteen thousand of another. * * *
>
> " The contract was not one in which the quantity of material delivered rested wholly in the will of him who was to receive it, nor was it one of those in which the **contracting parties had in mind the construction of a**

particular work, and the supply of the necessary material therefor; the work itself furnishing to both parties the ultimate measure of the quantity which the contract contemplated."

The only cases cited by plaintiff in error, besides the **Budge** case, in support of their construction of the letter of September 24, 1897, are **Cabot v. Winsor et al.**, 83 Mass. 546 (1 Allen 546), and **Shickle v. Chouteau Co.**, 10 Mo. App. 242. **Cabot v. Winsor et al.**, was a contract to furnish five hundred bundles of gunny bags, "more or less". It was, in the language of the Court in **Brawley v. United States**, a case in which, there being an "engagement to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract." **Shickle v. Chouteau Co.** was a contract for the sale of 400 tons of iron "more or less". Both cases, like the **Budge** case, fall under the second general rule stated by Mr. Justice Bradley, and are, therefore, inapplicable to the case at bar.

On the other hand in support of the construction given to the letter of September 24th, 1897, by the Court below, we respectfully call the attention of the Court, in addition to **Brawley v. United States**, to the following cases:

In **Thurber v. Ryan**, 12 Kan. 453, it was held that a contract to furnish six hundred cords, more or less, of stone, sufficient for the construction of a specified building, is not a contract to deliver six hundred cords absolutely, but only so much thereof as shall be required for the construction of the building.

In **Pembroke Iron Co. v. Parsons**, 5 Gray, 589, there was

an agreement to sell "a cargo of old railroad iron, to be shipped per barque Charles William, at thirty dollars per ton, delivered on the wharf at the port of discharge, dangers of the seas excepted—about 300 to 350 tons." Only 227 tons were delivered, and this was held a sufficient compliance with the contract. Shaw, C. J., said at page 590:

> "The subject of the contract of sale and purchase was a cargo of old railroad iron, to be carried by the barque Charles William from Savannah to Boston; it was a cargo, one cargo, only. It was then limited and measured by the quantity she could carry at once. **Whether the plaintiffs knew of the capacity of that vessel or not is immaterial, because they agreed to and adopted it, as the description and measure of their purchase. The figures at the bottom, 'about 300 or 350 tons,'** are undoubtedly to be taken as a part of the contract. But, taken with the context, they **manifestly express an estimate only, and do not control the descriptive clause designating and limiting the subject of the contract.** The defendant, having delivered a full cargo, has performed his contract, and the instructions of the judge were correct."

In **Tancred, Arrol & Co. v. Steel Co. of Scotland, Ltd.,** 15 App. Cas., 125, (1890) the Steel Co. had agreed with Tancred, Arrol & Co. to supply "the whole of the steel required by you" for certain work; and in another part of the contract the quantity was estimated at "30,000 tons, more or less." **Held,** that the Steel Co. had a right to supply all that Tancred, Arrol & Co. required for the work, although largely in excess of 30,000 tons. In this case the position of the parties was reversed from that in the case at bar; the price of steel had fallen, and

Tancred, Arrol & Co. sought to evade their contract and purchase steel at the decreased market price.

In **Navasso Guano Co. v. Commercial Guano Co.**, 93 Ga., 92, the Supreme Court of Georgia followed the rule laid down in the Brawley case and held that where a person purchased from another a certain and designated pile of fertilizer in bulk, the same being then stored in a named warehouse, and "estimated to be 253⅓ tons, more or less," the purchaser was obliged to take the entire lot, although it amounted to 702.7 tons.

See also:

Callmeyer et al. v. The Mayor, 83 N. Y. 116;
Harrington v. The Mayor, 10 Hun. 248; (affirmed in 70 N. Y. 604);
Day, Adm., v. Cross, 59 Tex. 595;
Watts v. Camors, 115 U. S. 353;
Hackett v. State, 103 Cal. 144;
Havemeyer et al. v. Cunningham et al., 35 Barb. 515.

IV.

The second point in the brief of counsel for plaintiff in error deals with specification of erors 4 and 6. It is claimed that the trial court erred in rejecting testimony offered by plaintiff in error to prove his own and his agent's actions, with reference to the contract, subsequent to the time that it was made, in support of his construction of the contract. The Court sustained an objection by the defendant in error to the following question propounded to the plaintiff in error: "Did you

reserve that amount of cement for them?" And also an objection to the following question put to the witness Baker, who was the agent of the plaintiff in error: "What did you do after you were notified by Mr. Percy that they had accepted your proposal?" In support of their argument on this point, counsel here assume that the letter of September 24, 1897, was ambiguous, and that parol testimony was proper to explain it. They first cite the case of **Budge v. United Smelting & Refining Co.**, 104 Fed., 498. But we submit that the case is not in point, because **no evidence was offered in that case; it was decided on a demurrer to the complaint.** In **Auzerais v. Naglee**, 74 Cal., 60, 67, the next case cited, the Court merely held that an author of a letter could explain in which of two senses he used the expression "settle;" but it does not hold that actions or declarations of the author in regard to the letter are admissible as showing his construction of the letter. In **Block v. The Columbian Insurance Co.**, 42 N. Y., 393, the next case cited, the acts of an officer of the defendant in his construction of a contract was used as evidence against the defendant, not in its favor. The case needs no further comment. **Knight v. New England Worsted Co.**, 56 Mass., 271 (2 Cush., 271), the next case cited, belongs to the same class as **Block v. The Columbian Ins. Co.**; and **Chicago v. Sheldon**, 9 Wall., 50, the last case, does not decide the point to which it is cited. On the other hand, we submit that this evidence was properly excluded under the rule that: **Self-serving acts and declarations of one of the parties to a contract subsequent to its execution, are not admissible to show either what he understood the contract to mean, or what it means.**

"Sayings of one party, in the absence of the other, tending to establish his version of the contract, and which form no part of the *res gestæ*, are not admissible in his own behalf."

Williams v. English, 64 Ga., 546, 548.

In Hill v. The John P. King Mfg. Co, 79 Ga., 105, 109, the Court said:

"The same witness was offered to prove the meaning of the instrument, or else the plaintiff's understanding of its meaning, by what the plaintiff had written about it to the witness, or rather, perhaps, by an inference which the witness had drawn from a letter which he had received from the plaintiff. This was also excluded. A party to a contract cannot, by proving what he said or wrote to a third person after the contract was entered into, show either what it means or what he understood it to mean. Such evidence is not admissible."

"The conduct, admissions and declarations of a party in his own interest are no more competent as evidence for his estate after his death than for himself while living."

Jones on Evidence, Sec. 236.

In Latimer v. Barrows, 163 N. Y., 7 (57 N. E., 95), a defaulting vendor sought to show by his own acts that the vendee had suffered no damage. The Court said, at page 96:

"That the evidence objected to should have been excluded seems obvious. It was, in effect, admitting in his favor proof of the plaintiff's own act or an act to which he was an essential party. If such evidence was admissible, a party might establish the extent of a liability of another or the absence of liability on his part, by proving his acts with a third person, as to

> which the other party could produce no proof. It is clear that a party may not prove his self-serving declarations in his own behalf. Upon the same principle, we think he cannot prove his self-serving acts in his own favor."

In **Travers v. Stewart**, 64 N. Y. S. 211, 213, a broker claiming from another broker half of a commission on a sale of land was held not entitled to introduce as evidence of his claim a writing sent by him to the owners of the land in which he asserted that he claimed one-half of the commissions, and the Court said:

> "At best, it was a declaration of a party in his own favor."

So a plaintiff will not be permitted to introduce a bill of particulars served by him upon the adverse party, as evidence of his cause of action.

Seim v. Krause, 83 N. W., 583, 585.

See also:

Nicholson v. Tarpey, 70 Cal., 608, 610.

Rogers v. Schulenburg, 111 Cal., 281, 286.

V.

In their third point counsel for plaintiff in error attack the ruling of the Court in striking out the conversations that were had between the witness Baker and Mr. Percy, several months after the letter of September 24th, 1897, was written (**Specification of Errors** 5 and 7). We shall not follow counsel in their argument with respect to the evidence. We think much more ground is covered than is necessary to a discussion of the alleged error. Except

for the circumstance that Mr. Percy was the architect of the building, the evidence here sought to be introduced is of the same character as that discussed in the previous subdivision—acts and declarations, with reference to a contract, by one party to the contract, in his own favor,—and was, therefore, properly excluded. So far as Mr. Percy was concerned, while he was the architect of the building, he was not the agent of the defendant in error for the purchase of cement; and whether or not he purchased 6,000 barrels on his own account (Tr., p. 45), or one barrel, could not in any way affect the defendant in error. Nor could the defendant in error be affected by conversations that the witness Baker had with Mr. Percy regarding cement. Mr. Percy was no more the agent of the defendant in error for the purchase of the cement for its building than he was for the purchase of the property on which the building was erected. Notice to Mr. Percy respecting cement was not binding on the defendant in error, which employed him as architect and not to purchase cement.

See

Renton Holmes Co. v. Monnier, 77 Cal. 449, 453, 454;

Wittenbrock v. Parker, 102 Cal. 93, 104;

Westfield B'k v. Cornen, 37 N. Y. 320;

Tootle v. Cook, 35 Pac. 193, 195;

Pennoyer et al. v. Willis, 36 Pac. 568;

Deane v. Roaring F. E. L. & P. Co., 39 Pac. 346, 348;

Strauch v. May, 83 N. W. 156.

VI.

The fourth point in the brief on behalf of the plaintiff in error relates to the alleged error of the trial court in refusing to grant the motion of plaintiff in error for a nonsuit. In reply to the argument on this point we think it is sufficient to call to the attention of the Court that, after the motion for nonsuit was made and denied, the plaintiff in error did not rest. Under these circumstances, this Court will not review the action of the trial court in denying the motion. It is a rule in the federal courts that: When a defendant does not rest after making a motion for a nonsuit, but introduces evidence in support of his own case, the action of the trial Court in denying the motion will not be reviewed.

> "By not resting on his motion for a nonsuit, and by thereafter offering his own evidence, the defendant waived his motion and the overruling thereof cannot be assigned for error here."

Runkle v. Burnham, 153 U. S. 216, 222.

See also:

Hansen v. Boyd, 161 U. S. 397, 403;

U. P. Ry. Co. v. Daniels, 152 U. S. 684;

Col. & Puget Sound Ry. Co. v. Hawthorne, 144 U. S. 202, 206;

Robertson v. Perkins, 129 U. S. 233, 236;

N. P. R. R. Co. v. Mares, 123 U. S. 710, 713;

Accident Ins. Co. v. Crandal, 120 U. S. 527;

Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700, 701.

VII.

Should it be determined that any error has been committed in the admission or rejection of any evidence in this case, then, we submit, it was harmless error and not ground for reversal, for the two following reasons:

a. In the first place, we have endeavored to show that, considering the letter of September 24th, 1897, alone, the plaintiff in error contracted to sell to the defendant in error as much cement as it should require for use in its building. If this position is sound, then none of the other evidence, including that admitted and rejected over the objection of the plaintiff in error, was material, and any error committed in that regard was, therefore, harmless.

b. If there was any error in admitting or rejecting evidence, it was harmless, because the Court declared that in its opinion the letter of September 24th, 1897, determined the liability of the parties. On page 54 of the Transcript, there is the following:

> "THE COURT: I do not think the testimony is relevant. The liability of these parties must be adjusted upon the contract. When that letter was written and delivered to Wells, Fargo & Co., and Mr. Baker was informed by Mr. Percy that his contract had been accepted, the terms were made and that was the end of the transaction, so far as the liability of the parties was concerned."

It appears, therefore, that the trial Court did not consider the parol testimony material or relevant.

A case tried by a Court without a jury will not be reversed because of the erroneous admission of harmless evidence:

"The admission of evidence in a case being tried by a court without the intervention of a jury does not require the nice distinction of ruling that it does when it is to go to a jury, and the fact that testimony is given in an answer or read in a deposition does not necessarily imply that it is improperly considered in the final examination and conclusion of the case. The same judicial mind that would exclude it from a jury can as readily set it aside upon a final consideration; and, where there appears sufficient evidence to justify the conclusions reached, the presumption is that the irrelevant testimony, although heard and not positively excluded by order, was set aside eventually, and not considered to the injury of the plaintiff in error."

Miller v. Houston City St. Ry Co., 55 Fed. 366, 372.

"The admission of immaterial or irrelevant evidence is no sufficient reason for reversing a judgment, when it is apparent, as in this case, that it could not have affected the verdict or the finding injuriously to the plaintiff in error."

Mining Co. v. Taylor, 100 U. S. 37, 42.

"The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are specially unwilling to reverse cases, because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

Holmes v. Goldsmith, 147 U. S. 150, 164.

"No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the rulings were made."

Lancaster v. Collins, 115 U. S. 222, 227.

See also:

Runkle v. Burnham, 153 U. S. 216, 221;
Louisville & N. R. Co. v. White, 100 Fed. 239, 243;
Chapman v. Yellow Popular L. Co., 89 Fed. 903;
Moline M. I. Co. v. York I. Co., 83 Fed. 66, 71;
Sipes v. Seymour, 76 Fed. 116;
Steiner et al. v. Eppinger et al., 61 Fed. 253;
U. S. v. Shapleigh, 54 Fed. 126, 137;
Reed v. Stapp, 52 Fed. 641, 645.

VIII.

In their fifth point counsel for plaintiff in error ask this Court to review the evidence in support of the special findings of fact that the plaintiff in error contracted to sell to the defendant in error as much cement as it should require for use in the construction of its building, and that the amount of cement contracted to be sold was not restricted to any particular number of barrels. In support of their request, they cite the case of National Cash-Register Co. v. Leland et al., 94 Fed., 502, 507; and in this particular they have worded their brief in the language of the decision in that case. But we submit that the language of the Court in that case is inapplicable to the case at bar, and that there is a vital distinction between the two cases. The specifications there, which were "inartificially and unskillfully drawn," relate to the judge's charge and to his refusal to give rulings which the plaintiff requested (p. 506). These are questions which are proper subjects of review. But in the

case at bar, while specifications nine and ten were not only not "inartificially and unskillfully drawn," they also relate to the special findings of fact and cannot, therefore, be considered on this appeal.

So far as the remark of counsel for the plaintiff in error, at the end of their brief, with reference to the hope of the Judge of the Court below, is concerned, we consider the remark improper and out of place; it is not in the record, nor do we remember ever having heard the Court give vent to the expression of hope here attributed to him. On the contrary, having but a few weeks previously to the time of the trial of the case at bar participated in the decision by this Court in the case of **Budge v. United Smelting & Refining Co.**, the Judge of the Court below called the attention of counsel in the case at bar, during the trial, to the **Budge** case, and, at the time of the rendition of judgment herein, he delivered an oral opinion, in which he said that, under the rules established by the case of **Brawley v. United States**, and by the **Budge** case, there was no doubt in his mind that the plaintiff in error had obligated himself by the letter of September 24th, 1897, to furnish all the cement the defendant in error should require for use in the construction of its building. Accordingly he made an order that judgment be entered for defendant in error.

In conclusion, we respectfully submit that no error of law was committed in the admission or rejection of evi-

dence in the trial of this case; that if any such error was committed it was harmless; and that, viewed from any standpoint, the judgment of the Court below should be affirmed.

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